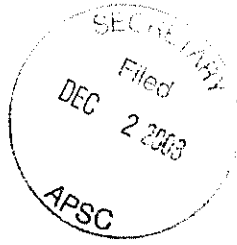




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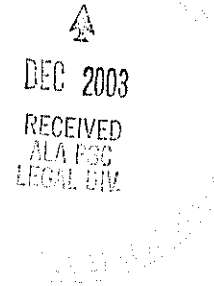


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December 2, 2003

BY HAND DELIVERY

Mr. Walter Thomas
Secretary
Alabama Public Service Commission
RSA Union Building
8th Floor
100 N. Union Street
Montgomery, Alabama 36104



Re: Petition For A Declaratory Order Regarding Classification of IP Telephony
Service; Docket No. 29016

Dear Mr. Thomas:

Enclosed for filing are the original and ten copies of Joint Reply Comments of ICG Telecom Group, Inc. and Level 3 Communications, LLC in the above-referenced matter.

Sincerely,


Paul A. Clark

PAC:dpe
Enclosures

**BEFORE THE ALABAMA
PUBLIC SERVICE COMMISSION**

IN RE: Petition for Declaratory Order)	Docket 29016
Regarding classification of)	
IP Telephony Service)	

**JOINT REPLY COMMENTS
OF ICG TELECOM GROUP, INC. AND
LEVEL 3 COMMUNICATIONS, LLC**

ICG Communications, Inc. ("ICG") and Level 3 Communications, LLC ("Level 3") (collectively, "Joint Commenters") submit these reply comments pursuant to the Alabama Public Service Commission's ("Commission") Order, released August 29, 2003, establishing this docket to consider the Incumbent Local Exchange Carrier ("ILEC") Petition for a Declaratory Ruling regarding the classification of Internet Protocol ("IP") telephony, or Voice-Over-Internet-Protocol ("VoIP") services.¹

I. INTRODUCTION AND SUMMARY OF INITIAL COMMENTS

The prospect of VoIP services has drawn the attention and ire of ILECs around the country. This is particularly true of rural ILECs. Similar to this proceeding, both the Washington Utilities and Transportation Commission and Oregon Public Service Commission have opened dockets to consider VoIP services as a result of rural ILECs' demands that non-cost-based access charges be imposed on VoIP.² Many other state commissions are considering issues relating to VoIP in a variety of contexts and the Federal Communications Commission ("FCC") recently announced it would initiate a rulemaking in order to comprehensively examine

¹ *Petition for Declaratory Order regarding classification of IP telephony*, Docket 29016, Order Establishing Declaratory Proceeding (Ala. P.S.C. Aug. 29, 2003) ("*ILEC Petition*")

² *Washington Exchange Carrier Ass'n et al v LocalDial Corp*, Notice of Pre-hearing Conference, Docket No. 031472 (rel. Sept. 29, 2003); *Oregon Exchange Carrier Ass'n et al v LocalDial Corp*, Complaint, Docket No. UCB-19 (filed Oct. 13, 2003).

VoIP-related issues.³ Despite the turmoil the rural ILECs have alleged VoIP is causing the industry, of the eleven sets of comments filed in this proceeding, ten oppose the *ILEC Petition*.⁴ In fact, the only comments supporting the *ILEC Petition* were submitted by its authors.

In addition to the Petitioners, comments were filed by BellSouth Telecommunications, Inc. ("BellSouth"), competitive local exchange carriers, VoIP providers, an association and a coalition. While one might expect the parties submitting comments in this proceeding to hold widely disparate views as to the appropriate action this Commission should take, in fact, the opposite is the case. Except for the Petitioners, all agree that the Commission should dismiss the *ILEC Petition*. The substance of the *ILEC Petition* is the reason for this unusual level of consensus. The Petitioners have asked this Commission to subject VoIP services to state common carrier regulation and to find that all VoIP traffic is subject to access charges. The Federal District Court for Minnesota ("District Court") has recently analyzed the appropriate classification of VoIP services and applied federal law to determine that VoIP providers offer an information service, not a telecommunications service.⁵ The District Court has further analyzed

³ See *FCC to Begin Internet Telephony Proceedings*, Public Notice (rel. Nov. 6, 2003); Letter from Michel K. Powell, Commission Chairman, Federal Communications Commission, to The Honorable Ron Wyden, Senator, United States Senate (Nov. 5, 2003) ("*Wyden Letter*") (attached hereto as Exhibit 1)

⁴ See *AT&T* at 1 (suggesting that the Commission should refrain from asserting jurisdiction over VoIP services); *Alabama Cable Telecommunications Ass'n* at 3 (advocating for a "default" position of refraining from regulating VoIP services) ("*ACTA*"); *Attorney General for the State of Alabama* at 2 (recommending that the Commission defer action until such time as the technical and legal issues are more fully developed); *BellSouth Telecommunications, Inc.* at 4 (stating that it would be a mistake to subject VoIP services to regulation) ("*BellSouth*"); *Joint Comments of ICG Telecom Group and Level 3 Communications, LLC* at 4-5 (arguing that the Commission should follow the lead of the FCC and the majority of state commissions and allow VoIP services to develop unfettered by regulation) ("*Joint Commenters*"); *ITC^DeltaCom Communications Inc.* at 1-2 (proposing that the Commission defer acting on the Petition for numerous reasons); *MCImetro Access Transmission Services, LLC* at 4 (advising that the Commission wait until the FCC acts before making any ruling concerning VoIP services) ("*MCP*"); *Net2Phone, Inc.* at 9 (supporting a finding by the Commission that VoIP services are not subject to Commission jurisdiction); *Voice on Net Coalition* at 11-15 (contending that VoIP services are interstate in nature); *Vonage Holdings Corp.* at 5-8 (encouraging the Commission to decline a finding of jurisdiction).

⁵ See generally *Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n*, Civil No. 03-5287(MJD/JGL), slip op. (D. Minn. Oct. 16, 2003) ("*District Court Decision*").

federal law and determined that regardless of state definitions, states may not impose common carrier regulation on information services.⁶

In light of the District Court's ruling, coupled with the FCC's decision to investigate VoIP-related issues, the Joint Commenters respectfully submit that any action taken by this Commission to regulate VoIP services would be at best premature and at worst subject to preemption by inconsistent federal law. Should the Commission determine that it will proceed and that it *may* have jurisdiction over VoIP service offerings, the Commission should still deny the *ILEC Petition*. The Commission must ask a critical, threshold question: should it subject VoIP services to the full panoply of common carrier regulation as requested by the *ILEC Petition*? There are numerous reasons why the Commission should not.

There are a myriad of policy reasons why VoIP should remain unregulated. Historically, common carrier regulation was imposed on providers of telephone service in order to restrain their monopoly power in the telecommunications marketplace. VoIP is a competitive service in a competitive marketplace where legacy regulations designed to restrain market power have no relevance. As Federal Communications Commission ("FCC") Commissioner Kathleen Q. Abernathy observed:

[I]t would be a huge mistake to carry forward legacy regulation whenever new technology platforms are established. Many of our regulations are premised on the *absence* of competition, and when that rationale is eroded, we must not reflexively hold on to regulations that no longer serve their intended purpose. In fact, many of our old rules not only become unnecessary as markets evolve, but they can be fatal to new services that need room to breathe.⁷

⁶ See generally *District Court Decision*.

⁷ Kathleen Q. Abernathy, Speech to the United PowerLine Council Annual Conference, *Reaching Broadband Nirvana* (Sept. 22, 2003).

FCC Commissioner Abernathy is not alone in advocating a cautious approach to imposing legacy regulations on nascent services. California Public Utilities Commissioner Susan Kennedy recently wrote:

State regulators argue that VoIP is a telecommunications service no different than phone services. Therefore, they should pay the same taxes and fees, as well as provide 911 service and access for the disabled. Regulating VoIP would protect consumers and provide a level playing field. But new technologies don't develop on a level field. They develop in the proving ground of unfettered competition where the risks are high and the rewards are worth it.⁸

And the Chairman of the Illinois Commerce Commission reportedly agrees that "VoIP is in such an embryonic state that the commission needs to look at the competitive landscape before determining whether to exert its jurisdiction or regulation."⁹

The Commission must remain cognizant of the risks associated with subjecting a nascent technology like VoIP to regulations developed for the purpose of restraining monopoly power. If the Commission chooses to assert jurisdiction over VoIP service, it should proceed cautiously and examine the impact that imposing common carrier regulations would have on the VoIP market. It cannot do that within the confines of *ILEC Petition*. Therefore, the Commission should dismiss the *ILEC Petition*.

⁸ Susan Kennedy, "Let Internet phone service evolve without rules," *SiliconValley.com* (Nov. 3, 2003) <http://www.siliconvalley.com/mld/siliconvalley/business/columnists/7173969.htm> (visited Nov. 13, 2003).

⁹ Glenn Bischoff and Vince Vittore, "States Push To Regulate Voice as Voice," *Telephony*, 9 (Sept. 22, 2003).

II. APPLYING EXISTING REGULATIONS TO VOIP SERVICES WOULD IMPEDE THE DEVELOPMENT AND DEPLOYMENT OF VOIP SERVICES

Setting aside for a moment the relevant factual and legal restrictions against regulating VoIP services, the overwhelming majority of commenters agree that for important policy reasons, the Commission should not regulate VoIP services. A number of commenters emphasize the fact that it is a nascent industry and saddling it with regulation threatens to either greatly reduce its ability to grow or potentially to destroy it.¹⁰ Some parties emphasize that VoIP services are offered in a competitive marketplace and common carrier regulation should only be imposed on industries that have market power.¹¹ Numerous parties also pointed to pending FCC proceedings concerning VoIP-related issues as a reason for the Commission to refrain from considering VoIP issues at this time.¹² Applying common carrier regulations to the VoIP marketplace and acting prior to the FCC's examination of VoIP-related issues may have the unintended consequence of severely handicapping the latest "killer app" that is increasing broadband demand and spurring the deployment of high-speed Internet access services.

The Commission, *at the very least*, should defer consideration of the *ILEC Petition*. Whatever findings the FCC makes in regard to VoIP services will directly impact this Commission's investigation. Further, this Commission would greatly benefit from the FCC's analysis of the salient issues as the impending VoIP rulemaking will surely attract comments from many different parties. Finally, the Joint Commenters respectfully submit that inappropriate regulation of a promising new technology would cause much more harm than good.

¹⁰ See, e.g., *AT&T* at 2; *Joint Commenters* at 20; *MCI* at 1.

¹¹ See, e.g., *AT&T* at 14-15; *ACTA* at 10-11; *Net2Phone* at 10.

¹² See, e.g., *AT&T* at 2-3; *ACTA* at 6-7; *MCI* at 4; *Net2Phone* at 9-10.

III. THE COMMISSION SHOULD REFRAIN FROM RULING ON ANY FORM OF VOIP SERVICES

BellSouth supports dismissal of the *ILEC Petition*. Specifically, BellSouth states:

BellSouth believes that it would be a mistake at this early stage in the development of VoIP technologies and services for this Commission and other state commissions to undertake what would amount to duplicative state proceedings that could, in turn, result in a patchwork of inconsistent state rules that interfere with the rapid evolution of these promising new consumer services and the development of an appropriate national regulatory framework for dealing with them.¹³

However, BellSouth also suggests that this Commission could somehow segregate out phone-to-phone Internet Protocol telephony and subject this type of VoIP service to common carrier regulation:

BellSouth agrees with the ILECs that at least one form of intrastate phone-to-phone IP telephony, the service described by AT&T in its current petition pending before the FCC, is at the extreme end of a range of IP Telephony Service configurations, and that its status under current regulatory classifications is clear. If this Commission were to grant the ILECs' request for declaratory ruling with respect to this particular service arrangement alone, this Commission would not be undermining the development of a national VoIP policy.¹⁴

It is unclear how BellSouth can advocate in one portion of its pleading¹⁵ that this Commission defer to the FCC and then argue for the opposite result in another when the procedural posture of all issues raised in this proceeding are identical for all forms of VoIP services.¹⁶ BellSouth notes that the FCC is currently considering VoIP-related issues in both the *Vonage Proceeding* and in the *pulver.com proceeding*¹⁷ and that the FCC intends to open a

¹³ *BellSouth* at 4.

¹⁴ *BellSouth* at 6-7.

¹⁵ *See BellSouth* at 2-5.

¹⁶ *See BellSouth* at 6-7.

¹⁷ *See BellSouth* at 2-4.

rulemaking dedicated to examining VoIP issues. As such, BellSouth maintains that it would be a mistake for this Commission to examine issues relating to VoIP.¹⁸

Notwithstanding the fact that the FCC is also considering phone-to-phone IP Telephony in the *AT&T Petition for Declaratory Ruling*, BellSouth suggests that this Commission declare that this type of IP Telephony is “nothing more than a normal voice call originating and terminating over standard telephones, indistinguishable from a circuit-switched voice call.”¹⁹ BellSouth postulates, without any support or argument, that a finding by the Commission concerning this form of IP Telephony would not conflict with the FCC’s efforts to develop a national VoIP policy.²⁰ The inconsistency of BellSouth’s position within the same pleading in and of itself makes clear that the Commission should not entertain BellSouth’s position that the Commission subject phone-to-phone IP telephony to common carrier regulation.

The Joint Commenters urge the Commission to recognize BellSouth’s argument for what it is: an attempt by BellSouth to short-circuit a considered evaluation of VoIP services by the FCC and this Commission. To be sure, the classification of just one type of VoIP service without a detailed factual record is far more complex than BellSouth leads this Commission to believe.

In the *Report to Congress*,²¹ the FCC considered the regulatory status of many different types of VoIP services including the form of phone-to-phone IP telephony that would later become the subject of *AT&T’s Petition for Declaratory Ruling*. The FCC recognized that there were disparate VoIP services characterized by diverse technologies and network deployments.

¹⁸ See *BellSouth* at 4.

¹⁹ See *BellSouth* at 7.

²⁰ See *BellSouth* at 7-8.

²¹ See generally *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11501(1998) (“*Report to Congress*”).

The FCC tentatively concluded in the *Report to Congress* that *no form of VoIP, including phone-to-phone IP Telephony*, would be regulated as a “telecommunications service” under federal law until the FCC had time to develop a complete record concerning VoIP service offerings.²² There is no support in the *Report to Congress* for BellSouth’s position that the Commission could impose circuit-switched regulation on “phone-to-phone” VoIP services that complete a voice call. Instead, in the *Report to Congress*, the FCC refrained from imposing any regulation on all classes of VoIP services, including phone-to-phone.

As detailed in the Joint Commenters’ initial comments, since the release of the FCC’s *Report to Congress*, the FCC has declined several opportunities to change its deregulatory approach toward VoIP services.²³ Shortly after the *Report to Congress*, US WEST petitioned the FCC for a declaratory ruling that local exchange carriers could impose access charges on VoIP service providers that met the four criteria for “phone-to-phone” VoIP services.²⁴ Effectively, BellSouth is requesting the same result sought by US WEST by attempting to segregate out phone-to-phone IP telephony services. However, the FCC has neither ruled on that petition, nor sought comment on it, despite the fact that it has been pending for almost five years. There are many other instances where the FCC has had the opportunity to regulate phone-to-phone IP telephony services and declined to do so.²⁵ Clearly, the FCC and Congress have preferred to

²² *Report to Congress* at ¶¶ 83, 89.

²³ *See Joint Comments* at 12-13.

²⁴ *Petition of U S West, Inc. for Declaratory Ruling Affirming Carrier's Carrier Charges on IP Telephony* (filed Apr. 5, 1999) (“*U S West Petition*”).

²⁵ *See Joint Comments* at 12-13; 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, Report and Order, 14 FCC Rcd 16602, ¶ 22 (1999); *Report to Congress* at ¶ 93 (citing *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market and Market Entry and Regulation of Foreign-Affiliated Entities*, Report and Order on Reconsideration, 12 FCC Rcd. 23891 (1997)); *see also* Remarks of Commissioner Susan Ness (as prepared for delivery), Information Session – WTFP (Mar. 7, 2001).

develop a holistic national policy concerning VoIP services that does not separate out certain IP telephony services for regulation, while allowing others to remain unregulated. This Commission should do the same and reject BellSouth's invitation to impose legacy economic regulation on any type of emerging VoIP service.

IV. CONCLUSION

The Commission should dismiss the *ILEC Petition* or defer consideration until the FCC completes its VoIP rulemaking. Any rulings made by the FCC concerning VoIP will impact this Commission's investigation into VoIP services and will also provide this Commission with an analytical framework to examine VoIP services. If the Commission does decide to proceed prior to FCC action, it risks preemption as well as the cost and time of conforming any findings to federal law.

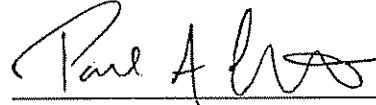
Aside from the fact that it would be premature to investigate VoIP services, there are numerous reasons for not subjecting it to existing common carrier regulations. VoIP services are offered in a competitive marketplace where the technologies and network architectures bear little resemblance to the circuit-switched network. Grafting existing regulations on new services would impede the continued development and deployment of VoIP services.

Finally, the Commission should reject BellSouth's ill-advised recommendation that the Commission simply regulate one form of IP telephony. The FCC is currently considering the appropriate regulatory treatment of phone-to-phone IP telephony so any decision made by this Commission concerning VoIP is subject to preemption. Further, existing FCC policy set out in the *Report to Congress* mandates that such services are better left unregulated until such time as the FCC acts.

For these reasons, the Commission should either dismiss the *ILEC Petition* or defer action until the FCC concludes its planned VoIP rulemaking and the Commission should not subject *any* form of IP telephony to regulation at this time.

Dated December 2, 2003.

Respectfully submitted,



One of the Attorneys for ICG TeleCom
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following by U.S.

Mail, properly addressed and postage prepaid, on this the 2nd day of December, 2003:

Francis B. Semmes, Esq.
BellSouth
3196 Highway 280 South
Room 304N
Birmingham, Alabama 35243

A handwritten signature in black ink, appearing to read "Paul F. H.", written over a horizontal line.

Of Counsel